Supreme Court, U.S.
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No. 99-____

IN THE
SUPREME COURT OF THE UNITED STATES

CHARLES O. ROBINSON AND
BELINDA TAYLOR,

Petitioners,

v.

SHERIFF OF COOK COUNTY,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

When class certification is sought in a Title VII disparate impact by a plaintiff who had filed a timely class charge of discrimination with the EEOC,

1. May a district court rely on its assessment of the strength of the individual plaintiff's claim to deny class certification?

2. May a member of the putative class, who had not filed her own EEOC charge, join in a timely filed action arising from a class charge of employment discrimination, either

    a. To pick up the gauntlet of class representative and litigate claims of disparate impact discriminaton for herself and for the class of persons similarly situated, or,

    b. To litigate her individual claim of discrimination?

3. Must an employer, who seeks to answer a *prima facie* case of disparate impact discrimination, do more than articulate a facially valid reason for its failure to hire?

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PETITION FOR WRIT OF CERTIORARI

Petitioners Charles O. Robinson and Belinda Taylor respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on February 8, 1999.

OPINIONS BELOW

The decision of the Court of Appeals (App. 1-7) is reported at 167 F.3d 1155 (7th Cir. 1999). The opinions of the district court (App. 9-13, 14-20) are unreported.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1254: The judgment of the court of appeals (App. 7) was entered on February 8, 1999; petitioners' timely petition for rehearing was denied on March 18, 1999. (App. 8.)

STATUTE AND RULE INVOLVED

This case involves 42 U.S.C. §2000e-2(k)(1)(A)(i) which provides as follows:

> (1)(a) An unlawful employment practice based on disparate impact is established under this subchapter only if—
>
> > (i) a complaining party demonstrates that a respondent uses a particular employment practice that caused a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity.

This case also involves Rule 23(a) of the Federal Rules of Civil Procedure:

> **(a) Prerequisites to a Class Action.** One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class (3) the claims or defenses of the representative party are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

STATEMENT

The original plaintiff, Charles Robinson, invoked the jurisdiction of the district court under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e, alleging that respondent Sheriff of Cook County was discriminating against African-American applicants in hiring correctional officers. Robinson filed suit after receiving his "notice of right to sue" on his charge of employment discrimination in which he had alleged, *inter alia,* that respondent had "failed and refused [to hire] me and other black persons as correctional officers in proportion to their representation in the pool of persons certified for employment."

The Sheriff of Cook County hires correctional officers from among those "certified" by the Cook County Sheriff's Merit Board. From May 27, 1992 to December 29, 1994, the Sheriff hired 53% of the non-African-American candidates, as opposed to 34% of the African-American candidates. The Sheriff was also quicker to hire non-African-Americans: From May 27, 1992 to December 29, 1994, the median time between date of certification and date of hire for non-African-Americans was 118 days, as compared to 313 days for African-Americans.

Petitioner alleged that the disparity in hiring rates made out a *prima facie* case of disparate impact discrimination under Title VII of the Civil Rights Act of 1964.[1]

Petitioner Robinson asked the district court to allow the case to proceed as a class action under Federal Rule of Civil Procedure 23(b)(2) for "all African-Americans who, after having been certified as eligible for appointment to the Cook County Department of Corrections Officer as a Correctional Officer on and after December 28, 1990, were not so hired." The district court refused to allow the case to proceed as a class action, concluding that respondent's claim that he had failed to hire petitioner because of a poor work history made petitioner's claims atypical under Rule 23(a) of the Federal Rules of Civil Procedure. (Pet.App. 14.) The district court invited joinder by other members of the putative class (Pet.App. 9.) but refused to permit petitioner Belinda Taylor to serve as class representative because she had not filed an EEOC charge. (Pet.App. 14.) For the same reason, the district court held that Taylor could not pursue her individual claim in this litigation.

The district court conducted a trial limited to the question of whether, assuming that Robinson had established a *prima facie* case of disparate impact discrimination, respondent could show that petitioner Robinson had been rejected

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1. The Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. §1607, recommend a finding of disparate impact when a facially neutral standard results in a "selection rate for any sex, race or ethnic group which is less than four-fifths (or eighty percent) of the rate for the group with the highest selection rate." 29 C.F.R. §1607.4. Here, the selection rate for African-American candidates was 64% of the selection rate for non-African-American candidates.

for a compelling business reason. (Pet.App. 2.) Respondent presented testimony from its former director of personnel that she had rejected Robinson because of his poor employment history. The district court accepted this explanation and found against petitioner Robinson.

On appeal, the Seventh Circuit upheld the denial of class certification (Pet.App. 4-5) concluding that Robinson could not be a class representative because his claim was "a loser from the start." (Pet.App. 4.) The Court of Appeals approved the district court's conclusion that Taylor could neither litigate her individual claim nor serve as a class representative because she had not filed her own EEOC charge. (Pet.App. 5.) The Court of Appeals also affirmed the district court's finding in favor of respondent on petitioner Robinson's individual claim. (Pet.App. 6.)

REASONS FOR GRANTING THE WRIT

-I-

The decision of the Seventh Circuit in this case that a person alleging discrimination in violation of Title VII may not join in a timely filed civil action unless she had filed her own charge of employment discrimination with the EEOC is in conflict with uniform decisions in the Second, Third, Fifth, Sixth, Eighth, Eleventh and District of Columbia Circuits which have interpreted prior decisions of this Court to fashion a "single filing" or "piggy-back" rule.

The "single-filing rule" is that an employment discrimination plaintiff may rely on a single filing "provided that '(1) the relied upon charge [to which he (or she) is piggybacking] is not invalid, and (2) the individual claims of the filing and non-filing plaintiff [the named filing plaintiff and the piggybacking plaintiff] arise out of similar discriminatory treatment in the same time frame.'" *Grayson v. K-Mart,* 79 F.3d 1086, 1102 (11th Cir. 1996), quoting *Calloway v. Partners National Health Plans,* 986 F.2d 446, 450 (11th Cir. 1993) "A party who has not filed an administrative charge

with the EEOC may still join a suit by 'piggybacking' on the administrative charge of one already a party to the suit." *Shempert v. Harwick Chemical Corp.*, 151 F.3d 793, 799 (8th Cir. 1998).

The "single-filing rule" is also applied in non-class action cases: "[I]n a multiple-plaintiff, non-class action suit, if one plaintiff has filed a timely EEOC complaint as to that plaintiff's individual claim, then co-plaintiffs with individual claims arising out of similar discriminatory treatment in the same time frame need not have satisfied the filing requirement." *Jackson v. Seaboard Coast Line R.R.*, 678 F.2d 992, 1011 (11th Cir. 1982).

The "single filing rule" is derived from the decision of this Court in *Albemarle Paper Co. v. Moody*, 414 U.S. 405, 414 n.8 (1975), where the Court held that "backpay may be awarded on a class basis under Title VII without exhaustion of administrative procedures by the unnamed class members." The Court applied this principle in *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 771 (1976) and again in *United Airlines, Inc. v. McDonald*, 432 U.S. 385 (1977).

The Seventh Circuit acknowledged the "single filing rule" but held that it only applied when "a Title VII class action is up and running." (Pet.App. 5.) This distinction is contrary to *United Airlines, Inc. v. McDonald*, *supra*, where class certification had been denied and a member of the putative class was permitted to intervene after judgment as the class representative, even though she had not filed her own EEOC charge. 432 U.S. at 389. This distinction is also at odds with decisions in other circuits allowing intervention by

persons who had not filed EEOC charges in cases where class certification was neither "up" nor "running."[2]

Outside of the Seventh Circuit, the uniform view is that

> It would be wasteful, if not in vain, for numerous employees, all with same grievance, to have to process many identical complaints with EEOC. If it is impossible to reach a settlement with one discriminatee, what reason would there be to assume that the next one would be successful.

Oatis v. Crown Zellerbach Corp., 398 F.2d 496, 498 (5th Cir. 1968).

Certiorari should be granted to resolve the conflict about the existence and applicability of the "single filing rule."

-II-

The decision of the Seventh Circuit that class certification may be denied because the individual plaintiff's claim "is a loser" (Pet.App. 4) rewrites Federal Rule of Civil Procedure 23 and is contrary to prior decisions of this Court.

In *United States Parole Commission v. Geraghty*, 445 U.S. 388 (1978), the Court recognized that when a plaintiff files a case as a class action, he (or she) brings before the district

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2. *See, e.g., Snell v. Suffolk County*, 782 F.2d 1094, 1100 (2d Cir. 1986); *Lusardi v. Lechner*, 855 F.2d 1062, 1078 (3d Cir. 1988); *Wheeler v. American Home Products Corp.*, 582 F.2d 891, 897 (5th Cir. 1977); *EEOC v. Wilson Metal Casket Co.*, 24 F.3d 836, 840 (6th Cir. 1994); *Allen v. Amalgamated Transit Union Local 788*, 554 F.2d 876, 883 (8th Cir. 1977); *Ezell v. Mobile Housing Brd.*, 709 F.2d 1376, 1381 (11th Cir. 1983); *Foster v. Gueory*, 655 F.2d 1319, 1323 (D.C.Cir. 1981).

court his (or her) individual claim as well as "the claim that he is entitled to represent a class." Id. at 402. The Court in *Eisen* declined to establish any rule other than that set out in Rule 23(a) to determine whether a plaintiff whose individual claim for relief had expired could fairly and adequately represent the proposed class. Id. at 406.

In *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974), the Court held that there is "nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action." Id. at 177. The Court quoted *Miller v. Mackey International*, 452 F.2d 424, 427 (5th Cir. 1971) for the proposition that "[i]n determining the propriety of a class action, the question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met."

The decision of the Court of appeals to uphold denial of class certification because the named plaintiff's claim is "a loser" is flatly at odds with Rule 23 as interpreted by this Court in *Eisen*.

A plaintiff's claim may not be typical of that asserted for the class when, because of the plaintiff's "unique situation," a major focus of the litigation will be upon a "a defense unique to him." *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 509 (9th Cir. 1992). But in this case, there was neither a showing nor a finding that the poor work history defense to plaintiff's claim was unique. Once petitioner established his *prima facie* case, respondent's burden would be to show a legitimate basis for rejecting nearly seventy percent of the African-American applicants as compared to fifty percent of the non-African-American applicants. It would not be surprising if respondent advanced the "poor work history" defense to explain its disparate hiring practices. Whether or not this defense could overcome a *prima facie* statistical is not relevant to class

certification.

In *Bazemore v. Friday,* 478 U.S. 385, 405 (1986), the Court rejected a wooden application of the typicality requirement of Rule 23. Certiorari should be granted in this case to correct an equally erroneous redefinition of "typicality."

-III-

The district court adjudicated petitioner Robinson's individual claim of discrimination in a manner analogous to that established by the Court for resolving claims of racially discriminatory use of peremptory challenges. *Purkett v. Elem,* 514 U.S. 765 (1995). Respondent introduced evidence that petitioner had been rejected because of a gap in his employment history; respondent did not introduce any other evidence to explain the statistical disparity in hiring rates between African-American and non-African-American applicants. In the view of the district court, respondent's evidence established that Robinson had been rejected for a non-discriminatory reason.

Under *Teamsters v. United States,* 431 U.S. 324 (1977), once the plaintiff has established a case of disparate impact discrimination, the burden "rests on the employer to demonstrate that the individual applicant was denied an employment opportunity for lawful means." 431 U.S. at 362. The employer should be required to do more to meet this burden than merely articulating a non-discriminatory reason for its employment decision.

CONCLUSION

It is therefore respectfully submitted that the petition for writ of certiorari should be granted.

June, 1999

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 98-2333

CHARLES O. ROBINSON AND
BELINDA TAYLOR,
individually and on behalf of a class of
similarly situated persons,

Plaintiffs-Appellants,

SHERIFF OF COOK COUNTY,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 95 CV 2205—**James B. Zagel** *Judge.*

Argued December 10, 1998—Decided February 8, 1999

Before Posner, Chief Judge, and Ripple and Evans, Circuit Judges.

Posner, Chief Judge. The appeal in this Title VII case presents questions of class action procedure. 42 U.S.C. §§ 2000e et seq.; Fed. R. Civ. P. 23. The suit was filed by Charles Robinson on behalf of those blacks (387 in all) who, although certified as eligible for appointment as Cook County correctional officers between roughly 1991 and 1995, had not been appointed when this suit was filed in 1995. The basis of the suit is disparate impact: only 34 percent of black applicants were hired during the period covered by the complaint, compared to 53 percent of white applicants. If disparate impact is proved, the burden shifts to the employer to show that the hiring methods responsible for the disparity are necessary to the efficient conduct of his business. 42 U.S.C. §2000e-2(k)(1)(A)(i).

The defendant (the Sheriff of Cook County) denied that the plaintiffs' statistics demonstrated disparate impact and asserted that the methods used to choose among the applicants, methods that include review of the applicant's employment history, an interview, and a drug test, are necessary to assure the hiring of competent correctional officers. Challenging Robinson's suitability as a class representative, the Sheriff presented evidence that Robinson's application had been turned down because of his very poor employment record, which among other things contained an unexplained 27-month gap between jobs. The judge rejected Robinson as class representative but permitted Belinda Taylor to join the suit as a plaintiff and take Robinson's place as class representative. But when it was discovered that Taylor had never filed a charge of discrimination with the EEOC, which is a prerequisite to filing a Title VII lawsuit, the judge threw out her claim and disqualified her from serving as Robinson's successor as class representative.

Robinson at this point was still in the case, though just with his individual claim. At his lawyer's suggestion, the judge conducted a bench trial limited to the issue whether, assuming without deciding that there was a prima facie case of disparate impact, the defendant could show that Robinson's application had been turned down for compelling business reasons. (Conducting an evidentiary hearing limited to a discrete, potentially dispositive issue is an authorized and frequently a sensible method for expediting the decision of cases. Fed. R. Civ. P. 42(b); *Thompson v. Mahre*, 110 F.3d 716, 720-21 (9th Cir. 1997). Separate trials on liability and relief are only the most common application of Rule 42(b). *See, e.g., MCI Communications Corp. v. AT&T Co.*, 708 F.2d 1081, 1166-68 (7th Cir. 1983); *Saxion v. Titan-C-Manufacturing, Inc.*, 86 F.3d 553, 556 (6th Cir. 1996).) The judge so found and dismissed Robinson's case. Robinson and Taylor appeal, arguing that the class should be certified with Robinson and Taylor as the class representatives

irrespective of the deficiencies in their claims, and in addition that the dismissal of Robinson's discrimination claim should be reversed.

In effect the appeal asks us to graft Robinson's timely filing with the EEOC onto Taylor's untimely but not-yet-shown-to-be-unmeritorious discrimination case to create a composite plaintiff to represent the class of blacks denied employment by the defendant. We cannot find any basis in law or good sense for such ghastly surgery. Neither plaintiff is a suitable class representative, and zero plus zero is zero.

In considering the issue of class certification, we set to one side the results of the bench trial. The fact that the named plaintiff in a class action turns out not to have a meritorious claim does not doom the class action. If Robinson should have been approved as class representative before his bench trial, the fact that he lost at that trial would not be fatal to the class. *Sosna v. Iowa,* 419 U.S. 393, 399 (1975). Certification would make the members of the class parties, and one of them could be selected as class representative in place of Robinson. The bench trial was limited to the question whether Robinson had been turned down for innocent reasons, and the circumstances of other class members might be different, in which event the suit could continue—though not (as we are about to see) with him as class representative.

So we must focus on the situation as it appeared when the judge ruled that Robinson was not a suitable class representative. Under Rule 23, the class representative's claim must be typical of the claims of the class, and he must also be an adequate representative of the class. Fed. R. Civ. P. 23(a)(3), (4). The first of these requirements is really an aspect of the second; if his claim is atypical, he is not likely to be an adequate representative; his incentive to press issues important to the other members of the class will be impaired. *General Telephone Co. v. Falcon,* 457 U.S 147, 157 n. 13 (1982); *In re American Medical Systems, Inc.,* 75 F.3d 1069,

1082-83 (6th Cir. 1996). And if when class certification is sought it is already apparent—as it was here because of Robinson's employment history as shown on the application that he submitted to the Sheriff's office—that the class representative's claim is extremely weak, this is an independent reason to doubt the adequacy of his representation. *East Texas Motor Freight System, Inc. v. Rodriguez,* 431 U.S. 395, 403-04 (1977); *Hardy v. City Optical Inc.,* 39 F.3d 765, 770 (7th Cir. 1994); *Hanon v. Dataproducts Corp.,* 976 F.2d 497, 508-09 (9th Cir. 1992). One whose own claim is a loser from the start knows that he has nothing to gain from the victory of the class, and so he has little incentive to assist or cooperate in the litigation; the case is then a pure class action lawyer's suit. *Cf. Frahm v. Equitable Life Assurance Society,* 137 F.3d 955, 957 (7th Cir. 1998). Finally, if the class representative's claim is both weak and typical—if the case as a whole is as weak as the representative's individual claim—then the case should be dismissed, with or without class certification. *E.g., Coe v. County of Cook,* 162 F.3d 491 (7th Cir. 1998). The plaintiffs' lawyer, who we assume is the real mover and shaker in this suit, would not be happy to have this case certified as a class action and then dismissed; that would have res judicata effect on any unnamed class members who did not opt out. *Eisen v. Carlisle & Jacquelin,* 417 U.S. 156, 176 (1974); *Pabst Brewing Co. v. Corrao,* 161 F.3d 434, 439 (7th Cir. 1998); *Bieneman v. City of Chicago,* 838 F.2d 962, 964 (7th Cir. 1988) (per curiam).

The point is not that a plaintiff is disqualified as class representative if he may fail to prove his case or if the defendant may have good defenses. *Wagner v. Nutrasweet Co.,* 95 F.3d 527, 534 (7th Cir. 1996). That would imply that the only appropriate class representative is a plaintiff who has a 100 percent chance of prevailing if the case is tried. But if his claim is a clear loser at the time he asks to be made class representative, then approving him as class representative can

only hurt the class.

The class here has 387 members. If none of them has a better case than Robinson, the suit should certainly fail. If some have better cases, we don't understand why the lawyer for the class has not added any of them to the suit. The case cannot have much merit if the only claim of the only other candidate for representative that the lawyer has been able to extract from this large number of people is clearly time barred.

If Robinson had been an appropriate class representative and if, the other prerequisites to class certification besides an appropriate class representative having been satisfied, something later had happened to make him no longer an appropriate representative—death, for example, or (the example we gave earlier) a definitive rejection of his case on the merits—the class action could be kept alive by the appointment of a new class representative. *Kremens v. Bartley,* 431 U.S. 119, 134-35 (1977); *Walters v. Edgar,* No. 97-2722, 1998 WL 865958, at *1-2 (7th Cir. Dec. 15, 1998); *In re Brand Name Prescription Drugs Antitrust Litigation,* 115 F.3d 456, 457-58 (7th Cir. 1997). It might even be someone like Taylor who had not filed a timely claim with the EEOC, because once a Title VII class action is up and running the class members are not required to inundate the EEOC with what amount to meaningless requests for right to sue letters. 42 U.S.C. §§2000e-5(e), (f)(1); *Forehand v. Florida State Hospital,* 89 F.3d 1562, 1565 n. 8 (11th Cir. 1996); *EEOC v. Wilson Metal Casket Co.,* 24 F.3d 836, 839-40 (6th Cir. 1994). But there was no class action when Taylor was added to the suit. There was no class representative who had dropped the baton for her to pick up; Robinson had never been approved as the class representative. Taylor's suitability as class representative had thus to be determined independently of him. *Wakeen v. Hoffman House, Inc.,* 724 F.2d 1238, 1245-46 (7th Cir. 1983); *Shempert v. Harwick Chemical Corp.,* 151 F.3d 793, 799 (8th Cir. 1998); *Griffin v.*

Dugger, 823 F.2d 1476, 1493 (11th Cir. 1987). She was even more unsuitable than he, looked at by herself, because her failure to file a timely charge with the EEOC was an even more disabling weakness than Robinson's spotty employment record.

Class action certification having been properly denied, and the district judge having committed no clear error in finding in the bench trial that Robinson's individual Title VII claim had no merit, the judgment of the district court is

Affirmed.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 98-2333

CHARLES O. ROBINSON AND
BELINDA TAYLOR,
individually and on behalf of a class of
similarly situated persons,

Plaintiffs-Appellants,

SHERIFF OF COOK COUNTY,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 95 CV 2205—**James B. Zagel** *Judge.*

[February 8, 1999]

JUDGMENT — WITH ORAL ARGUMENT

Honorable RICHARD A. POSNER, Chief Judge
Honorable KENNETH F. RIPPLE, Circuit Judge
Honorable TERENCE T. EVANS, Circuit Judge

The judgment of the District Court is AFFIRMED, with costs, in accordance with the decision of this court entered on this date.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 98-2333

CHARLES O. ROBINSON AND
BELINDA TAYLOR,
individually and on behalf of a class of
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Plaintiffs-Appellants,

SHERIFF OF COOK COUNTY,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 95 CV 2205—**James B. Zagel** *Judge.*

[March 18, 1999]

Before

Honorable RICHARD A. POSNER, Chief Judge
Honorable KENNETH F. RIPPLE, Circuit Judge
Honorable TERENCE T. EVANS, Circuit Judge

On February 22, 1999 plaintiffs-appellants filed a petition for rehearing with suggestion for rehearing *en banc.* All the judges on the original panel have voted to deny the petition, and none of the active judges has requested a vote on the suggestion for rehearing *en banc.* The petition is therefore **DENIED.**

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

CHARLES O. ROBINSON individuall
and on behalf of a class,

No. 95 CV 2205 *Plaintiff,*

v.

SHERIFF OF COOK COUNTY,

Defendant.

MEMORANDUM OPINION AND ORDER

Charles Robinson, the original named plaintiff, filed a timely charge of employment discrimination with the EEOC, alleging that the Sheriff of Cook County (Sheriff) discriminated aginst himself and "other black persons" on the basis of race and color in connection with his hiring of correctinal officers.[1] Mr. Robinson brought this present action within 90 days of receipt of his right to sue letter.

On 10 January 1996, I declined to certify the case as a class action; Mr. Robinson had claims atypical of the class, and would therefore be an inadequate class representative. However, I granted Robinson the opportunity to add an additional plaintiff to take up the gauntlet of class representative. On 11 April 1996, Mr. Robinson filed his Amended Complaint naming Belinda Taylor as an additional

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1. Specifically, that the Sheriff

> has hired a disproportionate number of white and Hispanic applicants and has failed and refused [Robinson] and other black persons [employment] as correctional officers in proportion to their representaion in the pool of persons certified for employment.

plaintiff.

The Sheriff now moves to dismiss Robinson's First Amended Complaint, which he alleges suffers from two defects. First Ms. Taylor cannot intervene as class representative in this Title VII action because she failed to exhaust her administrative remedies by not filing a charge of discrimination with the EEOC. Second, the timing issue set forth in paragraph 11(b) of the Complaint is not fairly encompassed with the EEOC charge filed by Mr. Robinson.

Title VII requires an aggrieved person to file a written charge with the EEOC as a condition precedent to seeking judicial relief. *Wakeen v. Hoffman House, Inc.,* 724 F.2d 1238, 1245 (7th Cir. 1983); 42 U.S.C. §2000e-5(e), (f)(1). The Sheriff asserts that Ms. Taylor's failure to file charges with the EEOC means that she has not satisfied the procedural requirements of Title VII and, therefore, cannot "piggy-back" on Mr. Robinson's timely filed charge. Ms. Taylor counters that the "single-filing rule" allows her to rely on Mr. Robinson's EEOC charge, and so intervene as sole class-representative.

The single-filing rule has been applied in both class actions and non-class action contexts, *Romasanta v. United Airlines, Inc.,* 537 F.2d 915, 918-19 & n.7 (7th Cir. 1976), *aff'd sub nom., United Airlines, Inc. v. McDonald,* 432 &.S. 385 (1977). Under the single-filing rule, a noncomplying plaintiff may join a suit initiated by a complying plaintiff under certain circumstances. *Zuckerstein v. Argonne Nat. Lab.,* 663 F. Supp. 569, 572 (N.D. Ill. 1987). It is not necessary for each person with the same grievance to file an EEOC charge either as a prerequisite to class membership or from serving as a class representative. *Griffin v. Dugger,* 823 F.2d 1476, 1492 (11th Cir. 1987), cert. denied, 486 U.S. (1988).

But, while the single-filing rule allows intervention as a member or a class representative, intervening as the sole

named class representative can be a very different kettle of fish. As long as "at least one named plaintiff timely filed an EEOC charge, the precondition to a Title VII action is met for all other named plaintiffs and class members." *Id.* (emphasis added). But, if someone seeks to intervene as sole named class representative, and they have not timely filed an EEOC charge, the single-filing rule does not apply. *Compare, e.g., Zuckerstein,* 663 F. Supp. at 573-75 and *Romasanta,* 537 F.2d 915 with *Wakeen,* 724 F.2d at 1245-46 and *Griffin,* 823 F.2d at 1492.

The reason for this difference is that class action lawsuits brought under Title VII must be prosecuted by named plaintiffs who have satisfied the filing requirements prescribed by Title VII, who have standing to raise the claims asserted, and who have representative capacity as defined by Fed. R. Civ. P. 23(a). *Connor v. Harris County,* Civ. A. No. H-88-0078, 1992 WL 337420 at *3 (S.D. Tex. 17 Sept. 1992), citing *Oatis v. Crown Zellerbach Corp.,* 398 F.2d 496, 498-99 (5th Cir. 1968). But as the Seventh Circuit expressly held in *Wakeen,*

> a class member who does not meet the procedural prerequisites for waging a Title VII suit may not use the guise of a motion to intervent to take over as the sole representative for someone who initiates but is not legitimately able to continue a class action.

724 F.2d at 1246.

Connor is directly on point, and though not binding, it is persuasive. In *Connor,* the originally named plaintiffs were found to be inadequate class representatives because of atypical claims. Id. at *8-9. Other persons sought to intervene in their place as named class representatives. Although none of these persons had satisfied the EEOC charge requirement, they argued that the "single-filing" rule allowed them to rely on the timely charges of discrimination filed by the originally named plaintiffs. Id. The court rejected the

position of the plaintiffs in intervention, finding that the "single-filing" rule cannot be used to circumvent either the requirements of Rule 23(a) (i.e., that class representatives have representative capacity) or the statutory requirement (i.e., that class representative must have satisfied the Title VII administrative prerequisites to suit). Id. at *9.

In the present case, Mr. Robinson was found to be an inadequate class representative due to the atypicality of his claims. Ms. Taylor argues she is entitled to intervene as sole class representative, although she did not file her own EEOC charge, because the "single-filing" rule allows her to "piggy-back" on Mr. Robinson's timely EEOC charge. But *Connor* definitively forecloses this argument, for the Court held that class members

> who have not met the administrative prerequisites for maintaining a Title VII suit may not rely on the single-filing rule to permit them to replace as sole class representatives plaintiffs who satisfy the administrative prerequisites to suit and initiated the action but who . . . were dismissed because they lacked standing to continue as class representatives.

Id., citing *Griffin*, 823 F.2d at 1493; *Wakeen*, 724 F.2d at 1245-46. Ms. Taylor cannot be the sole class representative in this case: she herself has not filed an EEOC charge, and she cannot rely on Mr. Robinson's timely filing under the "single-filing" rule.

The Sheriff's Motion to Dismiss the First Amended Complaint is granted without prejudice to Plaintiff's counsel, who have one month from the entry date of this Order to file a new amended complaint, proposing as the named class representative someone who has unquestionably complied with the statutory filing requirements of Title VII.

As for the timing allegation asserted in Paragraph 11(b) of the Amended Complaint, I believe I denied as moot the

Sheriff's Motion to Dismiss it in my oral ruling on 16 May 1996. If I did not then, I do so now.

Motion granted in part and denied in part.

Enter:

/s/ James B. Zagel
United States District Judge

Dated: July 12, 1996

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

CHARLES O. ROBINSON individuall
and on behalf of a class,

Plaintiff,

No. 95 CV 2205 *v.*

SHERIFF OF COOK COUNTY,

Defendant.

MEMORANDUM OPINION AND ORDER

Plaintiffs' counsel moves me to reconsider my Memorandum Opinion and Order of 12 July 1996 on the grounds that I allegedly applied a rule which "is squarely contrary to controlling Seventh Circuit authority" by "misreading the unpublished decision in *Connor v. Harris*, 1992 WL 337420 (S.D. Tex. 1992)." To understand the reasons why I reject this motion, I must backtrack.

In my oral ruling of 10 January 1996, I denied Robinson's motion for class certification because I concurred with the Sheriff's basic point that "Charles Robinson doesn't have a typical claim, and indeed his claim is so atypical that he's a lousy class representative." As I said in open court,

> I don't think this is a case suitable for class action because I think this is the wrong plaintiff as a class representative and I think that his claims are not going to be typical. There is enough in his background and the manner of his application that I believe the grounds on which Robinson will fight this case out are going to

be significantly different from the grounds on which some other more suitable plaintiff might fight it out.[1]

Why was Robinson nixed? As a preliminary requirement for any class certification, a named plaintiff must satisfy the prerequisites of "numerosity, commonality, typicality, and adequacy of representation"

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1. These statements as are characterized as follows in the instant motion: "The Court appeared to agree that . . . Robinson's claim was typical of the claim asserted for the class . . . [but] declined to certify the class . . . on the ground that Robinson was not an adequate class representative because of defenses which appeared unique to Robinson."

   I am not sure how these words could be interpreted as saying Robinson's claims were typical, but it does not matter: the typicality requirement relates to a class representative's defenses, as well as to their claims. Fed. R. Civ. P. 23(a)(3). There must be a "a nexus between the class representative's claims or defenses and the common questions of fact or law which unite the class." *Kornberg v. Carnival Cruise Lines, Inc.*, 741 F.2d 1332, 1337 (11th Cir. 1984), *cert. den'd*, 470 U.S. 1004 (1985). When the claims of the named representative are atypical of the class, due to the possibility of various defenses which might be available to the defendant against the named plaintiff, the class representative is inadequate: "[T]he presence of this characteristic peculiar to the named plaintiff does present a decision to deny class certification." *Warren v. The Reserve Fund, Inc.*, 728 F.2d 741 747 (5th Cir. 1984)), citing *Garonzik v. Shearson Hayden Stone, Inc.*, 574 F.2d 1220, 1221 (5th Cir.1978), *cert. den'd*, 439 U.S. 1072 (1979). The rationale is a concern that representation of the class will suffer if the named plaintiff is preoccupied with a defense which is applicable only to himself. *Id.*, citing *J.H. Cohn & Co. v. American Appraisal Associates, Inc.*, 628 F.2d 994, 999 (7th Cir. 1980).

set forth by Fed. R. Civ. P. 23(a). *Retired Chicago Police Ass'n v. City of Chicago*, 7 F.3d 584, 596 (7th Cir. 1993) (citations omitted). As all of these elements are prerequisites to certification, failure to meet typicality precludes certification as a class. *See id.*

The typicality requirement of Fed. R. Civ. P. 23(a)(3) is specifically concerned with the named representatives, directing the district court "to focus on whether the named representatives' claims have the same essential characteristics as the claims of the class at large." *Id.* at 596-97, citing *De La Fuente v. Stokely-Van Camp, Inc.*, 713 F.2d 225, 232 (7th Cir. 1983). If the essential characteristics are missing, it is fair to say that concerns about atypicality quickly become conerns about inadequacy of representation. That is what happened with Robinson.

Plaintiff's counsel was given a chance to find someone other than Robinson who could adequately helm the class action. Ms. Taylor was put forth as this someone, but there was a problem in naming her as sole class representative (which, with Robinson's rejection, she would have been). The problem was not that Ms. Taylor failed to meet the class action requirements of Rule 23(a), but that she did not meet the procedural requirements for a Title VII suit.

Representing a class in a Title VII suit requires not only satisfaction of the Rule 23(a) prerequisites for a class action, but also of the procedural prerequisites of Title VII,[2] including the filing of a written charge with

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2. Any analysis of the class certification must begin with the issue of standing and the procedural requirements of Title VII. *Griffin v. Dugger*, 823 F.2d 1476, 1482 (11th Cir. 1987). Only after the court determines the issues for which the named plaintiffs have standing should it address the question whether

the EEOC. *See Wakeen v. Hoffman House, Inc.*, 724 F.2d 1238, 1245 (7th Cir. 1983) (filing of an EEOC charge is "a condition precedent to seeking judicial relief" under Title VII). Under certain circumstances, a named plaintiff in a Title VII suit need not have filed their own EEOC charge to go forward; they can "piggyback" on the timely filing of someone else. But when the named plaintiff who failed to file an EEOC charge is proposed as the sole class representative, such piggybacking is not allowed. *See Wakeen*, 724 F.2d at 1246.

In *Wakeen*, the Seventh Circuit dealt with the issue of whether Gregory Hoffman, a purported class member, was erroneously denied leave to intervene, on the ground that he had never satisfied the prerequisites of Title VII by filing a charge of discrimination with the EEOC. 724 F.2d at 1245. Hoffman was denied leave to intervene after the original named plaintiff, Wakeen, was dismissed on the grounds of res judicata, and class certification consequently vacated "for lack of adequate class representation." *Id.* Since Hoffman had not filed an EEOC charge of his own, the Court found he could not rely on the EEOC charge filed by Wakeen. *Id.* at 1245-46.

Hoffman's frustration in becoming sole named representative was due less to the cause of Wakeen's dismissal (res judicata) than to Hoffman's own lack of qualifications (no EEOC charge). Hoffman could "not replace Wakeen and wage [] suit on behalf of himself

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the named plaintiffs have representative capacity, as defeined by Rule 23(a), to assert the rights of others. *Id.* (ciations omitted).

or other members of the class," *id.*, since "a class member who does not meet the procedural prerequisites for waging a Title VII suit may not use the guise of a motion to intervene to take over as the sole representative for someone who initiates but is not legitimately able to continue a class action." *Id.* at 1246.

So *Wakeen* is not mainly about the effects of res judicata on the standing of the originally named plaintiff, as plaintiff's counsel would have me believe. It is, I believe, primarily about the frustrated attempt of an intervenor to become not just "a" named plaintiff, but "the" named plaintiff by piggybacking on someone else's EEOC charge; Hoffman's downfall lay in his seeking "not to represent a subclass, but . . . to take over as the sole representative of the entire class." *Wakeen*, 724 F.2d at 1245.

Had Robinson not been previously rejected, Ms. Taylor may possibly have been able to piggyback on his charge as a companion representative. But since Robinson was rejected, *Wakeen* precludes Ms. Taylor from serving as sole class representative. Robinson was not a suitable class representative because his claims and/or defenses were atypical. He did not abdicate this position; like Wakeen, he "was involuntarily eliminated before the court made any determinations on the merits of the class claims." *See Wakeen*, 724 F.2d at 1246. Taylor's claims may or may not be typical of the class—I have not reached that consideration—but without her own right to sue letter, Taylor cannot satisfy the procedural requirements for sole class representative.

Plaintiff's counsel bases its request for reconsideration on my alleged misreading of the rule enuciated in *Connor*. But *Connor* was not the basis for my rejection of Ms. Taylor; *Wakeen* was. In rejecting Mr. Taylor, I

followed the rule in *Wakeen* which is controlling precedent in this circuit. *See Wakeen* at 1246 ("[N]othing in Title VII sugests the filing of a charge by one person obviates the need for any other similarly situated person to file such a charge before obtaining the right to sue.") (citations omitted). I cited *Connor*, which plaintiff's counsel admits is in accord with *Wakeen*, because its rule sprang from a factually similar situation: the EEOC charge of a named plaintiff dismissed as class representative for atypicality of claims was unavailable for use by a successor named plaintiff.

Just as Hoffman tried to piggyback (unsuccessfully) on Wakeen's EEOC charge in *Wakken*, so the intervenors in *Connor* sought (equally unsuccessfully) to piggyback on the EEOC charges of Bundage and Mims. One reason that Bundage and Mims were dropped as named representative was because they had atypical claims which prevented them from adequately representing the certified class. *Id.* at *5, *8-9. While lack of standing also may have been an issue in denying intervenors an opportunity to piggyback, *see id.*, the inadequacy of representation springing from atypicality was equally important in preventing piggybacking.

Under *Wakeen* (and *Connor*) a plaintiff may piggyback on someone else's EEOC charge to intervene as one member of the class, as repesentative of a subclass,[3] as an additional named plaintiff,[4] but not as the

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3. *See Vuyanich v. Republican National Bank of Dallas*, 505 F. Supp. 224 (N.D. Tex. 1980) (holding that subclass base but could rely on the EEOC charges of the two named plaintiffs). *See also Wakeen*, 724 F.2d at 1245 ("The [Vuyanich Court] simply allowed non-filing class members to represent subclass in a suit where the named plaintiffs met the jurisdictional prerequisites.").

4. *See King v. I.T.T./Continental Baking Co., Inc.* No. 84 C 3410,

sole named plaintiff.[5] But to be the sole named plaintiff in a class action under Title VII—and adequately represent your class —you cannot rely on the single filing rule, you must file your own EEOC charge. *See Wakeen*, 724 F.2d at 1246. This Ms. Taylor did not do.

Since I believe my ruling of 12 July 1996 was based on a correct reading of both *Wakeen* and *Connor*, if not necessitated by them, I deny plaintiff's counsel's motion to reconsider.

Enter:
/s/ James B. Zagel
United States District Judge

Date: *28 Aug, 1996*

1985 WL 2297, at *1 (N.D. Ill. Aug. 14, 1985) ("The narrow holding of *Wakeen* clearly does not apply where there are two named plaintiffs, and one of the co-plaintiffs has satisfied the EEOC filing requirements.").

5. In *Romasanta v. United Airlines, Inc.*, 537 F.2d 915 (7th Cir. 1976), *aff'd sub nom. United Airlines v. McDonald*, 432 U.S. 385 (1977), the Seventh Circuit suspended the Title VII filing requirement to allow other members of the class to take over the appeal, holding that when the class champion abdicates, other class members whose interests were at stake may intervene. But that case was specifically limited to appeals in the event of an abdication in order to avoid compromising the rights of the class and creating problems of inequality among class members. *See Wakeen*, 724 F.2d at 1245.